

Boston, Mass., Council.

[Miscellaneous publications,

Report of the Joint Committee on  
Public Lands in relation to the  
public garden. 1850.

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R E P O R T

OF THE

JOINT COMMITTEE ON PUBLIC LANDS

IN RELATION TO THE

PUBLIC GARDEN,

JULY, 1850.

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OF THE  
JOINT COMMITTEE ON PUBLIC LANDS  
IN RELATION TO THE  
PUBLIC GARDEN,  
J U L Y , 1 8 5 0 .



BOSTON:  
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C I T Y   O F   B O S T O N.

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*In Common Council, January 17, 1850.*

*Ordered,* That so much of the Mayor's address as relates to the "Public Garden," so called, be referred to the Joint Committee on Public Lands, with instructions to report specially at an early day, the amount of land comprised in said lot, and its estimated value; the tenure upon which it is held, and the conditions appertaining thereto, if there be any, and whether it is expedient to improve or sell it.

Sent up for concurrence.

FRANCIS BRINLEY, *President.*

*In the Board of Mayor and Aldermen,*  
*January 21, 1850. }*

Read, and concurred.

JOHN P. BIGELOW, *Mayor.*

## R E P O R T.

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The Joint Standing Committee on Public Lands, to whom was referred by an order of the City Council passed January 21st, 1850, so much of the Mayor's address as relates to the "Public Garden" (so called,) with instructions to report specially at an early day the amount of land comprised in the same, and its estimated value, the tenure upon which it is held, and the conditions appertaining thereto, (if there be any,) and whether it is expedient to improve, or sell the same, have considered the subject, and respectfully submit the following

### R E P O R T:

It is scarcely necessary for the Committee, to state that the subject of selling the lands west of Charles street, has often been agitated in and out of the City Council. Reports and plans have been made and submitted from time to time, and in eighteen hundred and forty-three, the City authorized the sale of the land between the continuation of Boylston street and the Boston and Providence Railroad Depot. Your Committee do not aim at presenting many new views on this subject, deeming it very desirable, and intending more particularly to collect and arrange the facts, to state the various opinions that have been entertained in former

years, and the result of their own investigations, and then to leave their suggestions for such action, as may be deemed expedient and proper by the City Council.

In the following remarks, the Committee will freely copy from the various reports and documents, that they have found among the City archives; not considering it necessary in all instances to minutely specify the sources of their information, but at the same time stating those facts only, which they consider well ascertained.

The history of the title to the *Common*, and other public lands, is clearly stated in an opinion given several years ago by Mr. Pickering, the former City Solicitor, an extract from which will not be considered inapplicable in this connexion.

He remarks that "The '*Common*' in this City, appears to have originated in a similar manner to that which has taken place, generally, in the towns of this Commonwealth in the early periods of their settlement. Those lands, which were not '*allotted*' to particular inhabitants and enclosed and occupied by them, remained open, and were denominated *Common Lands* or *Commons*, in which the inhabitants at large had rights of common, for pasturing their cattle or other purposes. In proportion as the population of the towns went on increasing, and '*lots*' were taken up by individual proprietors in the towns, the '*Commons*' were, of course, constantly undergoing a reduction in quantity, till they were either entirely disposed of, or in part retained, and eventually appropriated to other public uses, than those, to which they had been originally applied in a more simple state of society.

It may be further observed, that in this City, the lands on the '*Neck*', as far as Roxbury, constituted a part

of the ‘*Commons*,’ and are mentioned by that name in ancient conveyances. It does not appear, that the City, so far as can be now ascertained, holds the *Common* under a title distinct from that, under which it holds the public lands, generally, that have belonged to it from the early periods of its settlement.

The first ‘*Planters*’ took possession of the whole peninsula of Boston, then called the ‘*Neck*’ of land, ‘bounded by the sea or salt water on the northerly, easterly and westerly sides, and by the line of Roxbury on the southerly side.’ In the year sixteen hundred and thirty (September 7th) the General Court passed an order that ‘*Trimountain shall be called Boston.*’ About the year sixteen hundred and thirty-four, (as appears by an ancient deposition of John Odlin and other witnesses) the inhabitants treated with William Blackstone, a large landholder of that day, ‘*for the purchase of his estate and right in any lands lying within the said neck of land called Boston;*’ and for a consideration paid in money, being six shillings from every householder; he ‘*sold to the then inhabitants of said town, and their heirs and assigns forever, his whole right, and interest in all, and every the lands lying within said Neck.*’ Reserving to himself however, some lands, which are unimportant in the present inquiry. In addition to this conveyance from Blackstone, the town many years afterwards, (March 19, 1684–5,) took a deed of release from the Indian Sachem, *Charles Josias, otherwise called Josias Wampatuck, son and heir of Josias Wampatuck, late Sachem of the Indians inhabiting the Massachusetts in New England, and grandson of Chickatabut, the former Sachem.* This deed of release recites, that the grantor had been informed, that his grandfather had formerly sold to the *English planters and settlers,* the

whole neck, tract, or parcel, ‘known by the name of Boston,’—that the lands had been ‘divided out among them, and occupied, and enjoyed by them, peaceably and quietly, for about fifty and five years past’ &c. ; and this grantor confirmed the whole territory of the town to Elisha Cooke and others, for the use of the inhabitants.

After the purchase from Blackstone abovementioned, as testified in the depositions above referred to, the town laid out a place for a ‘*Training Field*,’ which, the witnesses add, ‘ever since and now is used for that purpose, and for the feeding of cattle.’

The portion of the *common lands* thus appropriated for a training field, &c., has ever been understood in a general view, to include what is now called in popular language, the *Common* ; and it may be presumed to have been land of such a quality, as was suitable for the purposes of a ‘*Training Field*,’ and ‘*the feeding of cattle*.’

The extent of this *Training Field* or *Common*, has however, varied at different periods, and the changes cannot now be ascertained with precision ; but the following brief statement of its history may afford us some aid.

By the town records it appears, that ‘on the thirtieth day of the first month, (March,) sixteen hundred and forty,’ it was agreed at a town meeting, as follows: ‘that henceforth there shall be noe land granted, eyther for houseplot or garden, to any person, out of the open ground or Common ffeild, which is left between Centry Hill and Mr. Colbren’s End ; except three or four lots to make up the streete from Br. Rob’t Walker’s to the Round Marshe.’

The place here called *Centry Hill* is the same which has been since known as *Beacon Hill* ; and Mr. Col-

bren the land owner here named, had his house near the corner of Eliot and Washington street. Such appears to have been at that day, the extent of the *Common* in a *northerly* and *southerly* direction; but this appears to have undergone some change, at different periods afterwards, which it is not material to specify. Its extent in a *westerly* direction also, is difficult to be defined with precision; but a practical result sufficient for the present purpose ‘may perhaps be attained, by a consideration of the nature, or quality of the *lands*, which may be supposed to have been appropriated to the particular uses, which the town had in view, and the manner, in which the whole, or any part of the lands, east and west of Charles and Pleasant streets, have been occupied or used, under the authority of the town at different times.’

In the early periods of its history, a document of some importance, is a lease given by the town to Governor Leverett, dated February 26th, 1665, by which they leased to him a piece of land in this part of the town, which is thus described in the lease, ‘a parcel of land lying and being in Boston aforesaid, called or known by the name of Fox Hill, with all the Marsh about the same so far as the salt water flows, bounded with the highway south, with the Town’s Commons east and north, and with the beach and sea west.’

The situation of ‘Fox Hill with the marsh about it’ is satisfactorily known, it being westerly of the present ‘Common,’ and with ‘the Marsh,’ extending in a *southerly* direction as far as the public lands now extend on Pleasant street, and probably, at the period of this ancient lease reaching still farther south. A part of the ‘Marsh’ lay westerly of Fox Hill, and a part easterly of it, or between that Hill, and the upland or

'*Common*,' and this last mentioned part of the 'Marsh,' (or a portion of it,) afterwards fell within the ropewalk grant, in which it is described as marsh land.

At the time of this lease, then, the *Common* seems to have been limited on the *west* side by a boundary line not perfectly defined, but in the general direction of the border of the upland, which could not have been far from the main course of Charles street, or the bottom of the *Common*.

Whether any part of the '*Common*' was then enclosed with a fence does not appear. But about sixty years afterwards; (March 15, 1737,) it appears that a fence had been placed round it; for the town then voted and ordered:—'That the openings or gaps, which lead into the *Common* be made up with posts and a rail on the top to prevent carts, &c., from going over it and spoiling the herbage;' and one of the selectmen was desired to cause the same to be forthwith effected, leaving only one gap or inlet near the Granary, to go up along by the workhouse to Beacon street, agreeable to said order.'

From that time to the present, the land which is commonly called the *Common* has been enclosed, but the borders of it have occasionally undergone changes with a view to improve the *Common* itself, or the streets which surround it.

So far as the votes and acts of the town or city may be of weight in determining the extent and meaning of the word '*Common*,' it may be remarked generally, that it has been in most instances, considered to include only the land enclosed by the fence; though there are some entries in the records, in which a greater extent westward is given to it."

The Committee deem it necessary to insert in this

report, a statement of other proceedings of the town and also of certain proceedings of the city relating to the public lands.

It appears from the records of the town, that on the twelfth day of August in the year seventeen hundred and ninety-four, a meeting of the people was held, for the purpose of determining "whether the town would appropriate the marsh at the bottom of the *Common*, or any other of the town lands for ropewalks, for the accommodation of the sufferers by the late fire." This had reference to a fire on Pearl street, by which the ropewalks there had been destroyed. At this meeting, the Honorable Thomas Dawes and others were appointed a Committee, to confer on the subject with the owners of the ropewalks so destroyed; and it was ordered that a survey should be taken of the "Marsh," and also, of part of the land on Boston Neck, sufficient for the purpose of erecting as many ropewalks as were consumed.

On the twenty-eighth day of August, of the same year, that Committee made a report, which was re-committed to them, with instructions "to confer with the sufferers, and to report a specific quantity of ground for their use, and the terms upon which the same be granted."

Their second report was made on the first day of the ensuing September, and was accepted and adopted by the inhabitants. In this report, after stating that they had again considered the subject, and had repeated conferences with the parties concerned, the Committee recommended the passage of sundry votes, to the effect: that there should be granted to the persons hereafter named, being the owners of the ropewalks so consumed by fire, a piece of marsh land, and flats at the bottom

of the Common, including the whole or such part of Fox Hill as might fall within the following bounds, viz:

"Beginning at the westerly end of Ridge Hill, five hundred feet from *Bacon* street, and running directly towards Eliot street, as far as the town's land extends on the west side of Pleasant street, so far as to leave a space of fifty feet between this line and the end of the rail fence projecting down from the burying ground on the south side of the Common; then extending in *weather* three hundred feet from the point at which the above described line may strike upon Pleasant street, being bounded westerly throughout by a line run parallel with the line first described, and beginning at the head of the town's land at the southerly part of the marsh, and running in a northerly direction until it shall meet with a line drawn from the westerly end of Ridge Hill parallel with *Bacon* street, as is more fully described on a plan taken by Mr. Osgood Carlton, August 29, 1794."

"And that the said grantees should be authorized and empowered to extend the limits of the land granted fifty feet over the flats; they relinquishing the same space on the easterly side of said land, or to alter the said limits so as to extend across the said marsh in a diagonal direction, provided, they did not in either case come nearer than fifty feet to the end of the rail fence aforesaid, nor run northerly so as to cross the said line to be run parallel with *Bacon* street; reserving sixty feet in width across the southerly end of said piece of land, for a road from Pleasant street down to the channel. That the following grants in fee simple should be made, viz: the first fifty feet in width from the easterly side, being Lot No. 1, on that plan, to Isaac Davis; the second fifty feet in width, being Lot No. 2, to Jeffrey

Richardson; the third fifty feet in width, being Lot No. 3, to Samuel Emmons; the fourth fifty feet in width, being Lot No. 4, to William and Archibald McNeil; the fifth fifty feet in width, being Lot No. 5, to John and Richard Codman; the sixth fifty feet in width, being Lot No. 6, to Edward Howe; reserving, however, a right in the town to carry sluices and drains through the said piece of land to the salt water, in any direction, forever. These grants were made upon the following conditions:—

First, That neither of the said grantees nor their heirs or assigns, should at any time thereafter erect, or cause to be erected any ropewalk, upon the lands where the late ropewalks were consumed by fire, nor any part thereof.

Second, That there should never be any other buildings than ropewalks, nor more than six of them erected on the lands granted.

Third, That the heads of the ropewalks which should be erected on the same should be placed at the southerly end thereof; "that they should not be more than one story in height, nor the eaves more than seven feet from the floor, except forty feet from the head of each walk for a store," which might be two stories high and built of brick, and covered with slate.

Fourth, That the grantees should erect, in the space of two years from the time of the grant, at their own expense, a sufficient sea wall in the opinion of the Selectmen, the whole length of the granted land, on the westerly side thereof, at a distance not exceeding thirty feet from the same; the right of property in which wall, if erected without the bounds of the grant, should be in the town.

Nothing in these grants was to be considered as conveying to the grantees or either of them, any right of passage in any direction across the common, to or from the granted lands.

The Selectmen in the name and behalf of the town, were authorized to execute good and sufficient deeds to the respective parties, of the respective lots, upon these conditions, and with these restrictions and reservations; and to insert in each of the deeds, so to be executed, a covenant on the part of the town, that it would not build any ropewalk on the Common, nor ever thereafter grant any part thereof, for the purpose of building such walk. The Selectmen were also authorized to lay out a road sixty feet wide from Pleasant street, along the easterly side of these lands over the marsh towards Beacon street, in order to meet a road that might be opened from West Boston Bridge.

The question as to the dimensions of the ropewalk buildings, was submitted to the inhabitants on the ninth day of March, of the following year, and was by them referred to the Selectmen, to be settled in the manner, which they should deem most expedient for the interest of the town, "upon the most liberal construction of the foregoing votes."

Only one deed appears by the records to have *ever* been given by the town of any of these lands, and that was to William and Archibald McNeil of lot No. 4, describing it as being fifty feet in width, and extending from a line parallel to Beacon street, and five hundred feet therefrom, to a street then lately laid out by the Selectmen, sixty feet wide, leading from Pleasant street to the salt water, and bounded northerly on that line, easterly on land granted to Samuel Emmons, southerly on the above mentioned new street, and westerly on

land granted to John Codman. This deed was executed by the Selectmen, and is dated August 31, 1796, and may be found recorded with Suffolk Deeds, Book 184, p. 142.

On the twenty-third day of May, eighteen hundred and three, a Committee were appointed with full power to effect a settlement with these proprietors, and to give them deeds, upon the original terms imposed, or upon such other terms as would be for the interest and advantage of the town.

The buildings on these lands having been destroyed in the mean time, on the tenth day of March, eighteen hundred and six, a meeting was held by the town, to determine the expediency of taking any measures, relative to the rebuilding of the same, and the subject was then referred to the consideration of the Selectmen, who subsequently in the same month, made a report to the effect; that the town granted to the proprietors of the ropewalks, the ground on which the same stood, for the purpose of ropewalks, and for no other use whatever, and that the proprietors had done nothing to forfeit their right of rebuilding.

On the sixteenth day of January, eighteen hundred and twenty-three, a Committee were appointed by the City Council, to confer with the proprietors, and ascertain on what terms they would release to the City their interest in the lands under and near their ropewalks. The Committee were also empowered, to cause plans to be drawn, to show in what manner it was expedient that the land should be improved, and further to consult with the Boston and Roxbury Mill Corporation on the subject of such improvement, and the bounds of their "empty basin."

A report was made by this Committee on the twenty-

fourth day of the following March, in which they stated the result of their conferences to be, sundry propositions on the part of the proprietors, and one on the part of the Boston and Roxbury Mill Corporation. The proprietors offered to release to the City, all their interest in these lands for the sum of \$86,000—or one quarter part thereof if the City would release to them the remaining three quarters, and grant them the liberty of erecting dwelling houses thereon. Or if the City would fill up the land to a height suitable for the erection of buildings, and release one half thereof to them with such liberty, they would give a release to the City of the residue.—Or would give the sum of \$30,000, if the City would release its interest in the whole of the same, and confirm to them a good title thereto, with the privilege of erecting dwelling houses thereon.

The Committee further stated that the Boston and Roxbury Mill Corporation had no general plan of improvement to propose, but would consent that if the City should fill up its flats, the materials therefor might be taken from their empty basin. That the Corporation were also willing to have the bounds of this basin adjusted and fixed, and were ready to treat with any persons authorized on behalf of the City to fix the same; contending, however, that by force of their charter, they had a right to take so much of the flats of the City, or of individuals, as they might require for such basin, and that they had not forfeited the flats granted to them by virtue of a vote of the town passed October 20, 1813.

This forfeiture was insisted upon by that Committee, as well as the right of the City to fill up and occupy the flats to the channel, provided the distance should

not exceed one hundred rods from the shore. An amicable adjustment of the matter was suggested by them, with a proposition that a Committee should be appointed for that purpose. And in concluding their report, the Committee remarked, that they "did not deem it expedient to recommend the acceptance of either of the propositions of the ropewalk proprietors."

This report was accepted.

On the sixth day of November in the same year, the proposition that the value of the ropewalk lands should be referred to appraisers, was accepted on condition, that they should be restricted in their estimation, to the value of the land, for the purpose specified in the original conveyance from the town, and a Committee were accordingly appointed to effect the reference, and in the month of January following, they reported that they had referred the matter to the decision of Patrick T. Jackson, Ebenezer Francis, Edward Cruft, Peter C. Brooks, and John P. Thorndike, upon the express reservation that their award should be subject to the final approval of, or rejection by the City Council; but that one of the proprietors of the land had objected to be bound by the award, upon the ground that the obligation so to be bound was not mutual, the City having a reserved power to accept or reject it, and that the same would not be assented to and carried into effect by this proprietor. For the purpose of obviating and removing this obstacle, on the recommendation of the Committee, it was resolved, that a bond should be entered into on the part of the City, conditioned to abide by and perform the award of these referees, the proprietors giving similar bonds.

On the twenty-fourth of the following May, the Mayor reported to the City Council the award, which

was in substance, that there should be paid to the proprietors the sum of \$54,000, in full for their respective rights, empowering the City, however, to retain from and out of this amount sufficient to pay off any incumbrances on the land.

On the twenty-fifth day of February, in the year eighteen hundred and twenty-four, Joseph W. Lewis, then of Boston, by a deed of that date, with an unlimited warranty, recorded with Suffolk Deeds, [Book 290, folio 193.] in consideration of the sum of one dollar, and for the further consideration expressed in an agreement entered into with the City, of the same date,\* conveyed to the City, in fee simple, the three ropewalk lots next to the Common, bounded southeastwardly, on Pleasant street, two hundred feet; northeastwardly, on Charles street, one thousand and six feet; northwestwardly, on land of the City, one hundred and fifty feet; and southwestwardly, on lot No. 4, eleven hundred and thirty-eight feet. In the same deed he released the dower of his wife, alleging that he was authorized so to do, by virtue of a resolve of the legislature passed on the twenty-first day of that month. His wife, Ann Lewis, also on the twenty-fourth day of April, eighteen hundred and twenty-four, by a joint deed with her husband, quitclaimed the same unto the City.

Henry Chapman, by deed dated Feb. 25, 1824, and recorded as above, liber 290, folio 194, containing an absolute warranty, conveyed for a like consideration, to the City in fee simple, lot No. 4, describing the same

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\* This agreement was, among other things, that the City should pay to Lewis the amount awarded to be paid to him, within thirty days after the making and publication of the award, retaining therefrom the amount which might be necessary to pay off incumbrances on the land. An agreement of a like purport was entered into with the various other proprietors.

as follows:—southeastwardly on a street leading from Pleasant street to the salt water, measuring fifty feet; northeastwardly on lot No. 3, eleven hundred and thirty-eight feet; northwestwardly on land of the city, fifty feet; and southwestwardly on lot No. 5, eleven hundred and thirty-eight feet. This deed also contained a release of dower. William Gray and Amos Binney, by a like warranty deed, of the same date and recorded as the last, and for a like consideration, (except that no specific time was assigned in the agreement, for payment of the sum awarded,) and containing a release of dower conveyed in fee simple to the city, lot No. 5, bounding and describing it as follows, viz:—southeastwardly on Pleasant street, fifty feet; northeastwardly on lot No. 4, eleven hundred and thirty-eight feet; northwestwardly on land of the city, fifty feet; and, southwestwardly on lot No. 6, eleven hundred and thirty-eight feet. Amos Binney, by a like deed of the same date, and recorded as above, folio 195, and for a similar consideration to that mentioned in the deeds of Lewis and Chapman, and containing a like release of dower, conveyed in fee simple to the city lot No. 6, bounded and described in the manner following, viz:—southeastwardly on Pleasant street, fifty feet; northeastwardly on lot No. 5, eleven hundred and thirty-eight feet; northwestwardly on land of the city, fifty feet; and, southwestwardly also, on its land, eleven hundred and thirty-eight feet.

By these conveyances, the City became again seized and possessed of all the land granted in 1794 to the ropewalk proprietors, containing six specific lots.

On the sixth day of July, eighteen hundred and twenty-four, a Committee duly appointed in that behalf, reported that they had discharged and paid off all the

mortgages, existing on the ropewalks formerly belonging to Joseph W. Lewis, and that the title of the City to the whole of the ropewalk lands, thereby became complete and unquestionable; and they thereupon recommended a vote of the people upon the question of the disposition of the same. On the same day, it was ordered that a vote of the inhabitants qualified to vote in city affairs, should be had on the twenty-sixth instant, on the questions: first,—whether the City Council should have authority to make sale of the upland and flats owned by the City, lying west of Charles street, on such terms, and at such times, as they might deem expedient; and, secondly, whether they should have authority to annex as a condition to such sales, the provision, that the land known by the name of the Common, and lying between Charles, Beacon, Park, Common and Boylston streets, should be forever thereafter kept open, and free of buildings of any kind, for the use of the citizens.

At this meeting it was determined, that a Committee of twenty-five persons should be chosen, two from each ward, and one by the twenty-four so chosen by the respective wards, to consider and report on the subject at an adjourned meeting. This report was presented at a meeting held on the sixteenth day of the ensuing December, and its consideration was deferred to the meeting to be held on the twenty-seventh day, when the questions to be determined, as suggested by the Committee, were proposed to the meeting. The first and second questions were exactly the same as those mentioned to be considered on the twenty-sixth day of July. The third was; whether the City Council should be authorized to bring the question of boundaries between the City, and the Boston and Roxbury Mill Corporation to a settlement, and for that purpose

be authorized to renew or confirm the former grants and acts of the town, with respect to that Corporation, on such terms and conditions as they might deem expedient; provided that no confirmation or conveyance should be made in virtue of their vote, to authorize the erection of dwelling-houses or other buildings on any part of the premises.

The fourth was; whether the City Council should be authorized to prepare for sale, and to convey on such terms and conditions as they might deem fit, so much of the upland and flats as were situated southerly of a line, beginning at a point on Charles street thirteen hundred and fifty feet southerly from the dam belonging to the Boston and Roxbury Mill Corporation, and opposite to the southwesterly corner of the Common, and running westerly at an angle of eighty-five degrees with Charles street to the bounds of the City flats; provided, that there should be annexed to all the conveyances, a condition, that the Common and all the upland and flats lying westerly therefrom, should be forever after kept free of and unincumbered by any buildings.

On the first question, the vote was 846 in the affirmative, and 1,027 in the negative. On the second, 1,111 in the affirmative, and 737 in the negative. On the third, 464 in the affirmative, and 1,360 in the negative. And on the fourth, 420 in the affirmative, and 1,404 in the negative. There had been presented to the City Council, prior to this meeting, a remonstrance by William Phillips and others, against the sale of the rope-walk lands.

The Committee deem it advisable, in order that a correct and sufficient knowledge may be attained of the tenure upon which the Public Garden is held by the City, to insert in their present report the substance of the various proceedings of the City Council, on the sub-

ject of the settlement of the bounds of the property of the Boston and Roxbury Mill Corporation, and of the adjoining property of the City.

On the twelfth day of January, in the year eighteen hundred and twenty-six, it appears that a petition of this corporation was presented to the City Council, praying that commissioners might be appointed to settle the respective rights of the petitioners, in and to the receiving basin, (so called,) or flats in the Back Bay; upon which a Committee were appointed to take legal advice, in regard to the rights of the City in the matter.

On the ninth day of October following, this Committee made their report, recommending that another Committee should be appointed by the City Council, with full powers to settle and adjust with the proprietors of land west of Washington street, and the corporation, the division line of their land and that of the City: provided, that no agreement should be made, which should authorize the said proprietors, or the said corporation, to erect any building between the channel and Charles street. Which report was accepted, and the proposed Committee appointed. And, on the twenty-sixth day of December in that year, an agreement of three parts, was entered into, by and between the City, these proprietors of flats and real estate on the easterly and southeasterly sides of the receiving basin, and this corporation, whereby the boundary line between the three contracting parties was settled and described as follows, viz: "Beginning at a point on the dam, six hundred and fifty feet from Charles street, thence running in a straight (being the first) line, southerly till it strikes the southwesterly line of Castle street continued into the basin, at a point twelve hundred feet from Washington street, as marked upon a plan made by S. P. Fuller; thence running southwest-

erly in a straight (being the second) line, through or along land claimed by said proprietors, or other individuals, passing through the boundary line between the said City and Edward Tuckerman, Esq., at a point twelve hundred feet from Washington street, and extending until it strikes a point in said City's land, two hundred feet distant from said boundary line last named; then turning and running westerly in a straight (being the third) line, by a cedar post to Northampton street, as marked on said Fuller's plan; thence northerly along the easterly side of said Northampton street to the boundary line between Boston and Roxbury." And in and by said agreement the City and the proprietors of the flats, &c., did agree in consideration of the covenants and agreements of the Boston and Roxbury Mill Corporation, that the latter should have, hold, and enjoy in fee simple, all the right, title, and interest, which the City or either of the proprietors then had, or ever had, in and to the land and space within the basin, lying westerly and northerly of the three lines first above described, and easterly of the line of Northampton street; excepting the right reserved to the board of health by the act of incorporation of the Boston and Roxbury Mill Corporation. It was also therein agreed, that the City and the proprietors, in fee simple, separately and respectively, according to their several rights and estates in and to the upland to which the flats were adjacent, should have, hold, and enjoy all the right, title, and interest, whether of property or flowage, and every other right, of whatever name or nature, which the Corporation then had, or ever had, in and to the land and flats claimed by the City or the Proprietors, lying between the three lines first above described and the adjacent upland, and between said east side of Northampton street and the adjacent upland. This

agreement also gave a right forever to the City and these proprietors to dig, lay, and maintain all convenient and necessary sewers or drains from the upland to the channel or deep water within the basin, according to law and the common and usual practice for the time being within the City; and also, a right to dig and carry away in common with the Corporation, and those whom they might license, mud and earth from the vacant flats within the basin; which right, (it was provided) should not be construed to give said City and the proprietors any right to dig to a greater depth than the level of the sills of the sluice-ways, nor within one thousand feet from the main drain or cross-dam west of the channel near Charles street, nor east of said channel, within two hundred feet of that dam, nor for any other purpose than that of filling up and raising the said flats and land bordering upon the basin, and belonging to the City and the Proprietors.

There was a further covenant or agreement in this instrument, that neither the Corporation or its assigns, should erect any building within the basin in front and west of the City's land on Charles street, within the distance of one hundred rods from that street, unless the City or its assigns should erect buildings upon their land in front and west thereof, and that neither the Corporation or its assigns, at any time should erect any buildings within the basin between that street and the channel immediately in front and west of that street, whether the City should use its land for building or not. And, further, that the erection by the City on its land, of gun-houses, school-houses, or other like buildings, to be used exclusively for public purposes, and not for rent or profit, should not authorize said Corporation to build within that distance, and that whenever the Corporation should so build, the City

might build on the whole space which it owned between said street and the channel, before the execution of the agreement. And, that the City authorities, whenever they might deem it expedient, might lay out as a free and common highway, that part of the road or dam of the Corporation, which extended from said street to the channel, and might then fill up their land opposite to said street so as to connect it with the adjacent dam, and to pass freely to and from the same. The tide water, also, was not to be voluntarily let into said basin by said Corporation, higher than might be necessary for the common and ordinary use of the mill-power, to the injury of any of the parties, but no damages were to be claimed unless the water was thus raised to a greater height, than three feet above the level of low water in the said basin at neap tides. The Committee executing this agreement on the part of the City, averred and declared in writing, that one of the conditions of their signing the same, as well as their understanding thereof was "That in case the Corporation should build on the land west of the channel, within sixteen hundred and fifty feet of Charles street, all the land lying between that street and the centre of the channel should revert and belong to the City, in fee simple." The agreement, however, was subsequently altered by the parties in interest, so that if the Corporation should build as last mentioned, then all the land lying between that street and the channel should revert and belong to the City in manner aforesaid.

On the first day of February, in the year eighteen hundred and twenty-seven, by an indenture of that date, made by and between the City and that Corporation, the same line was established between them, and the latter released to the former, the estate, premises

and rights it had released by the last mentioned agreement to it, and the said proprietors of flats, &c.; and the City released to the Corporation, the same estate and premises, it had released by that agreement.

This indenture also contained a provision, that whenever the "Corporation shall build on said basin within one hundred rods of Charles street, then all the land in said basin east of the following line, that is to say; a line beginning on the Mill Dam six hundred and ninety feet from the westerly side of Charles street, and running southerly in a straight course to a point on the line between Josiah Vose's land and the City's land, distant nine hundred and twenty-six feet and three inches from the northerly corner of said Josiah Vose's house on Pleasant street, measuring on the line of said Vose's land as marked on the plan of said Fuller, shall revert to said City, and belong to it, its successors and assigns, in fee simple forever; and the said Corporation will convey or release to the City accordingly."

It will thus be seen, that the bounds of the land of the City adjacent to the Public Garden, were definitely settled by these agreements.

A petition of Horace Gray on behalf of himself and his associates, was presented in the board of mayor and aldermen, on the twenty-fifth day of September, in the year eighteen hundred and thirty-seven, praying that the petitioners might be permitted to occupy a portion of the city's land west of Charles street, as and for a public garden; and the same was duly referred to a Committee.

On the sixth day of November of that year, an order was passed by the City Council to the effect, that the Committee on Public Lands should be authorized and empowered to grant to the petitioners, the use of such portion of the lands mentioned in their petition, for the

proposed garden, as they might deem expedient, upon the following terms and conditions :—

1st. That no building should be erected on the land permitted to be so used, other than green-houses, tool-houses, or such other buildings as might be necessary for properly maintaining a garden for flowers.

2d. That no such building should exceed fourteen feet in height above the level of Charles street.

3d. That no building should be erected thereon which should impair the contract between the Boston and Roxbury Mill Corporation, and the City.

4th. That all buildings or other property belonging to the petitioners should be removed from the ground, and the land peaceably surrendered to the City authorities, whenever the City Council should require, they giving nine months notice of such requisition.

5th. That the Trustees or Directors of the garden should annually make a report to the City Council, signed by a majority of their board, stating the expenditures made and the income received.

6th. That the Proprietors of the garden should, in no case, receive to their own use a greater amount than six per cent. per annum on the amount invested by them therein.

7th. That all income arising from the garden over and above such percentage, should be expended in improvements on the grounds.

8th. That the petitioners should procure and file with the city clerk, the written assent of the proprietors of the Boston Water Power Corporation, and of the Boston and Roxbury Mill Corporation, (if in the opinion of the city solicitor, the last named Corporation had any interest therein,) to the grant by the City,

and their waiver of any claim of any right whatever, under their contract with the City, or in any way, in consequence of such grant, or of the use of the land as a Public Garden; the instrument containing such consent and waiver to be satisfactory to the city solicitor.

9th. That no fence should be erected on the westerly side of Charles street, other than such as might be sanctioned by the mayor and aldermen.

10th. That this order should be void unless the garden should be actually commenced within eight months from its passage, and notice thereof be lodged by the petitioners with the city clerk.

On the twenty-fourth day of September, in the year eighteen hundred and thirty-eight, a further petition was presented by the same persons, stating that they had been unable to conform to the foregoing order, and praying that they might occupy the proposed land upon the condition, that no building whatsoever, should be erected thereon. Whereupon a Committee were appointed to consider the same and report a plan exhibiting the location, and quantity of land which the petitioners desired.

Their report was made on the eighth day of October, to the effect that the land should be granted, accompanied by an order, the passage of which was by them recommended; and which was in substance, that the Committee on Public Lands should be authorized and empowered to grant to Horace Gray and his associates, the use of such portion of the lands west of Charles street, and also of the lands west of Pleasant street, as they might deem expedient for the purpose of a Public Garden, upon substantially the same conditions as beforementioned, except that no buildings whatever, in any event, should be erected on any part of the lands west

of Charles street; and that no buildings should be erected on the land situate elsewhere, other than green-houses, tool-houses, or other such buildings as might be necessary for properly maintaining a garden of flowers, and that these should not exceed fourteen feet in height above the level of Pleasant street;—that no fence should be erected on that street or Charles street, other than such as might be approved of by the mayor and aldermen; and that the order should be void unless the garden should be commenced within twelve months from its passage, and notice thereof filed as abovementioned.

The whole report embracing the proposed order was recommitted to the same Committee with instructions to consult the city solicitor, as to the right of the City Council to authorize the erection of any building, on any part of the land proposed to be granted.

On the twelfth day of November, the Committee made their further report, in which they stated that they had consulted the city solicitor on the subject, and that litigation would probably follow, upon the erection of buildings on the land; the City Solicitor having expressed his opinion that the right to erect buildings thereon was of a doubtful character, under the compact between the City and the Boston and Roxbury Mill Corporation; meaning that in the event of the erection of buildings by the former or its assigns "west of Charles street," (for his opinion was requested in reference to the erection of buildings there only, and not west of Pleasant street,) then that the Corporation would have a corresponding right to erect buildings on their own land on the other side of the channel; not by any means that the City or its assigns were absolutely debarred from building. They therefore proposed that the Committee on Public Lands, should be au-

thorized and empowered to grant to the petitioners, the use of such portion of the lands west of Charles street, as they might deem expedient, for the purpose of a Public Garden, upon substantially the same conditions as mentioned in their last report.

The Committee on Public Lands having been empowered pursuant to this order, reported in the month of the succeeding January, that they had assigned to Mr. Gray and his associates twenty acres and a half of land, which together with a small piece reserved by the City, was bounded as follows, viz; "beginning at the point of intersection formed by the westerly side of Charles street, and the southerly side of the Mill Dam or Western avenue, and thence running southerly by the westerly side of said Charles street about thirteen hundred and ten feet to the northerly side of a forty feet street, leading to the city hay scales near the empty basin; thence running westerly by the northerly side of said forty feet street about eight hundred and thirty feet, to the line established between the City of Boston, and the Boston Water Power Company; thence turning and running northerly by said last mentioned line, about thirteen hundred and ten feet to the said Western Avenue; thence running easterly by the southerly side of said Western Avenue six hundred and fifty feet to the point of beginning; containing about twenty-two and one quarter acres; reserving, however, from the above described premises about one acre and three quarters of an acre, for the use and occupation of said City of Boston; which is bounded and described as follows, viz: beginning at a point in the northerly side of said forty feet street leading to said hay scales, at the distance of two hundred and fifty feet from the westerly side of said Charles street; thence running by a circular line drawn with a radius of one hundred feet to a point

seventy-five feet northerly from said forty feet street, and at right angles from a point in the northerly side of said street, which is three hundred and nine feet and six inches from the westerly side of said Charles street; thence running by another circular line drawn with a radius of one hundred feet to a point one hundred and fifty feet northerly from said forty feet street, and at right angles to a point in the northerly side of said forty feet street, which is three hundred and sixty-nine feet distant from the westerly side of said Charles street; thence running westerly parallel to said forty feet street, and at the distance of one hundred and fifty feet therefrom, about four hundred and forty-five feet to the line established between said City of Boston, and the Boston Water Power Company; thence running southerly by said last mentioned line, one hundred and fifty feet to said forty feet street; thence running easterly by the northerly side of said forty feet street, about five hundred and eighty feet to the said point, which is two hundred fifty feet west from Charles street, conforming to a plan examined by Alexander Wadsworth, dated December 26, 1838."

This land composed nearly the whole of the present Public Garden. And on the twenty-sixth day of October in the year eighteen hundred and forty-six, an order was passed by the City Council that the residue of the land, between the then Public Garden, and the continuation of Boylston street, should be granted to these proprietors, or trustees, on the same terms and conditions, as the former grant, with a reservation for the use of the City, of such part thereof as was occupied by, or appurtenant to its buildings.

By an act of the Legislature passed on the first day of February eighteen hundred and thirty-nine, Horace Gray, George Darracott, Charles P. Curtis and their

associates, and successors, were made a corporation by the name of the Proprietors of the Botanic Garden in Boston, with all the powers, and privileges, and subject to the duties, restrictions, and liabilities mentioned in the forty-fourth chapter of the Revised Statutes, and were empowered to hold real and personal estate to an amount not exceeding fifty thousand dollars. It may be well to observe here that these persons were the original petitioners or some of the original petitioners for the use of this land,

On the fourteenth day of November, eighteen hundred and forty-two, the Committee on Public Lands were instructed to take into consideration, the expediency of laying out and disposing of the City's lands, southwest of Charles street, provided the same could be done to advantage, and for the benefit of the City.

On the twenty-eighth day they reported that it would not be for the interest of the City to sell at that time.

On the twenty-fourth day of April in the next year, the Committee were requested to advertise for sale such land as in their opinion could be profitably sold without prejudice to the interest and convenience of the City.

On the fourth day of the succeeding September a remonstrance was presented by the Boston and Providence Railroad Corporation, against the sale by the City of an alleged street, on the southerly end of the ropewalk lands. The remonstrants stated that in the year seventeen hundred and ninety-four, the inhabitants of the Town of Boston, in town meeting legally assembled, reserved a certain lot of land sixty feet wide for a street and public highway, running from Pleasant street to the channel of Charles River, being on the southerly end of these lands, and that from that time, the said piece of land sixty feet wide, had been known, recognized, and used

as a public street and highway, and had never been discontinued, and had been staked and fenced out by the City, and that the abutters on said street had derived and acquired an indefeasible right and easement in common with all other inhabitants of the City, in said piece of land sixty feet wide to be used perpetually as a street and public highway ;—and further setting forth that they owned land contiguous thereto, and that the street was of great value and benefit to them, and that the City had advertised the same for sale, and moreover that they would contest by all legal means, the right of purchasers and others, to incumber or obstruct the same.

About the same time there was also a remonstrance presented, signed by Josiah Bradlee and others, against the sale of the lands lying on Pleasant street, and the flats reclaimed from Charles River ; which two remonstrances were referred to the last mentioned Committee, who shortly afterwards made their report thereon, to the effect ; that the land in question was not “in front and west of Charles street,” the limit defined in the contract between the City and the Roxbury Mill Corporation to which some of the remonstrants had referred, and that even in the event of the erection of buildings by the City “in front and west of Charles street,” this Corporation would not be “ relieved from all restrictions from building on their flats contiguous to the flats and land belonging to the City,” as these last remonstrants stated, for in “no case could that Corporation build on this side of the channel,” and that the land so advertised, in its state at that time, “was unworthy to be named as City property,” being an “unsightly waste, the resort of menageries and public shows, and the receptacle of the dirt and filth of the city ;” that they could not agree as one of the remonstrances had assumed, that that land had always

been regarded as "*appurtenant to the Common;*" neither could they agree that this land and that west of Charles street were "*under the same title and none other than that whereby the Common, strictly so called, was held;*" for that within twenty years before, at the time of, and after the adoption of the City Charter, the fee of that land belonged to private individuals, on which were erected high and commodious hemp stores, and that the circumstance that the Ordinance of 1834 mentions "*flats contiguous or appurtenant*" to the Common, while the City Charter specifies the *Common and Faneuil Hall* only as exempt from sale, was decisive of this question in the minds of the Committee. The ordinance passed April 10, 1834, here referred to, provided for the appointment of a Superintendent of and Committee on Public Lands, and the disposition by sale or otherwise by him, under their directions, of all and any of the lands of the City, *except the Common and flats contiguous or appurtenant to the same, and the City Wharf east of Faneuil Hall Market.*

From this ordinance, it is evident that the sale of such flats, (and the Committee so state in their report,) would require the sanction and approval of the City Council in order to be valid, but that the Superintendent, under the regulations prescribed by the Land Committee, had full power to sell any land to the City, other than that mentioned in the exception without such sanction and approval. Upon this report an order was passed confirming a sale of a part of these public lands by the Committee, and authorizing them to sell such other parts of the same as they might deem for the public interest. The Committee in conjunction with their report presented an opinion of Mr. Pickering, then City Solicitor, upon the subject of the right of the City to sell the public lands, which had been so adver-

tised. In it he states, "I am of opinion, that the City has a legal right to sell the lands in question, notwithstanding the suggestion now made against such right. It has been suggested, that by an indenture made February 1st, 1827, between the City of Boston and the Boston and Roxbury Mill Corporation, the right to sell is taken away. The indenture referred to contained no prohibition of *the right to sell*; but, in respect to the tract of land, which bounds easterly on *Charles* street, and which is the subject of the covenants in that indenture, the instrument provides, that neither the above named Corporation, nor their assigns, shall erect any building within said Basin, (*the Receiving Basin,*) in front and west of the City's land on *Charles* street, within the distance of one hundred rods from said street; unless the City or its assigns shall erect buildings upon their said land in front and west of said *Charles* street; and further, that neither the said Corporation nor their assigns shall, at any time, erect any buildings within said basin, between said street and the channel immediately in front thereof, and west of said street, whether said City shall use its said land for building or not.

The effect of this covenant is not to restrict the City from selling the whole, or any part of the lands on *Charles* street, but that, if the City or its assigns shall erect buildings on that land, then the Boston and Roxbury Mill Corporation and their assigns shall have the like right to build on their land opposite to it, and on the west side of the channel, but not within one hundred rods, or sixteen hundred and fifty feet of *Charles* street.

The latter provision of the above covenant may require a short explanation. It refers to a strip of land lying on the *easterly* side of the *channel*, and which

upon the settling of the boundary line between the City and the Corporation, fell within the bounds of the Corporation's lands.

The effect of these covenants then, is—

1st. That the Corporation agree not to build, in any event, unless the City or its assigns shall first build.

2d. If the Corporation or its assigns shall in such case build, then the strip of land above described shall not be used by the Corporation, but shall revert to the City.

As Charles street is understood to terminate (southerly) at the place where it meets Boylston street, the lands proposed to be sold, do not appear to be comprehended within the limits of the land, upon which the above indenture would operate.

That land is referred to, as lying 'in front and west of the City's lands on Charles street;' and in a subsequent clause of the indenture, restricting the Corporation as to the erection of buildings on their own land opposite to that of the City, the land of the Corporation west of the City's land is referred to as being 'between said street and the channel immediately in front thereof and west of said street,' which description of the Corporation's land concurs in defining the bounds of the City's land.

But even if the lands proposed to be sold, could by legal construction be deemed a part of the lands upon which the indenture is to operate, which I do not think is the case, still that instrument does not restrict the right of *selling*, as I have before observed."

At or about the same time his opinion was requested by the Common Council upon the question, "*whether the City Council have any power under the City Charter to sell any part of the public lands west of Pleasant and south of the continuation of Boylston street.*"

This latter opinion bears date September 27, 1843, and in it he states, that "presuming by the terms in which the question is proposed, it was not intended to inquire whether any *express* power to make sale of the public lands in question, was given by the Charter, but whether it contained any prohibition applicable to the present case, against the exercise of the general power, which the City Council has to sell any part of the public lands," he would consider the subject accordingly.

He continues, "By the provision of the charter, (Section 16,) the City Council has full power *to lease or sell* any of the public lands or buildings, except Faneuil Hall and the *Common*.

As therefore the lands now in question are not in any manner connected with Faneuil Hall, it follows that unless they constitute a part of the Common, the general authority to sell, would extend to them, as well as to any other portion of the public lands.

The question under consideration, therefore, is in substance, whether the lands proposed to be sold are a part of the Common, within the intent and meaning of the charter; if they are a part of it, they cannot be sold, if otherwise, they may be.

I beg leave here to observe, that with respect to a part of these lands, that is the southerly part, I have lately given an opinion\* by request of the Committee on Public Lands; and as that opinion has been submitted to the Common Council and printed for their use, I ask leave on the present occasion to refer to it, so far as concerns that portion of the land in question.

That the southerly part of the *ropewalk lands*, (as they have been called,) did not constitute a part of the Common, within the purview of the charter, at the time

\* The opinion here referred to, was an opinion given in reference to the alleged highway, sixty feet wide, mentioned in the remonstrance of the Boston and Providence Railroad Corporation.

it was granted, is manifest, from the fact, that the whole of those lands for nearly thirty years before, had not been the property of the City, but of private individuals, and so continued for two years after the granting of the charter, when they were re-purchased by the City, of the proprietors." After stating that the subject of the sale of the upland and flats west of Charles street, was submitted to the inhabitants in general meeting, as before remarked, he adverts to the fact that the Common, in one of the questions submitted, was described as lying between Charles, Beacon, Park, Common, and Boylston streets, and was thus known, recognized, and understood by the City Government.

He proceeds, that "It has been suggested, that the lands in question may be considered as a part of the *Common*, on the ground of their being *flats*, and as such appurtenant to the upland called the *Common*, in conformity with the principle of the ancient Colony ordinance respecting rights in flats. The question now presented, however, does not, in my opinion, bring the case within the principle of that ordinance. The flats, undoubtedly, were the property of the City, and were appurtenant to their upland; but they were not the property of the City, as being appurtenant to the *Common* as such. The term *Common*, was the name of a piece of land appropriated to a specific public use; as, at one time, for a pasture, at another, for a training field, at another for a public walk, &c.; and a *Common*, by that description, would not be presumed in law, to draw after it as an incident, the adjacent flats, particularly if those flats were of such a nature as not to admit of their being used and enjoyed for the purposes of a pasture, a training field, a public walk, &c., to which the *Common* itself was appropriated." Mr. Pickering further stated, that although some of his remarks in

this opinion, might be considered as having a bearing on the subject of the lands immediately west of the Common, yet his opinion was intended to be confined to the legal question submitted to him, as to the right of the City to sell the lands *west of Pleasant street and south of the continuation of Boylston street.*

It is deemed advisable to mention in this connection, that the ropewalk lands (so called,) composed nearly one half of the width, and about two thirds of the length of what is now called the Public Garden, together with a tract of land now known as the easterly part of the continuation of Boylston street, and land lying southerly of that continuation; and that nearly the whole of those lands south of that continuation, have been sold by the City, and a large portion thereof built upon. Your Committee have also caused to be searched the records of our Courts to ascertain what judicial action, (if any,) has been taken in relation to the ropewalk lands, and the residue of the lands west of the Common, and have found but two cases relating thereto, the precise nature and result of which, it is material should be set forth in this report.

The first was a bill in equity, filed November 1, 1843, in the Supreme Judicial Court for this county, brought by the Boston and Providence Railroad Corporation against the City. In it, this Corporation averred the laying out by the City of the sixty feet street or public way, mentioned in their remonstrance; that they had located the terminus of their road near the same, and the only access to their depot and store-houses for merchandize and passengers was over this street, save a narrow passage, over their land eighteen feet wide and wholly inadequate for that purpose; and, further, that the City had given public notice that they should make sale on the third day of November

then next ensuing, of the soil of the said way, laid out into house and other building lots, and should close up the same by permanent fences and other obstructions; and that the complainants had reason to fear that the purchasers of the said lots, if sold, would place substantial and permanent buildings thereon. It concluded with a prayer for an injunction against the City, restraining them "from stopping up, or in any manner obstructing the said way, and from making sales of the soil thereof."

It is evident, that this suit was instituted solely for the purpose of preventing the City from selling or obstructing this alleged way, situated at the southerly part of the ropewalk lands, and was not instituted for the purpose of preventing sales of any other land in that vicinity belonging to the city. This position is further and conclusively established, by the order for a temporary injunction passed by the court on the same day the bill was filed, which was as follows:—

"SUPREME JUDICIAL COURT, }  
Norfolk ss. } Oct. Term, 1843.

"It is ordered by the court, that upon filing in the office of the clerk of this court in the county of Suffolk, the Bill of Complaint wherein the Providence Railroad Corporation are complainants, and the City of Boston defendants, and the affidavits which have been read in the same cause, a writ of injunction issue directed to the said city, and their servants and agents, enjoining them from selling any lands lying within the limits of the *way* described in the said Bill, and from incumbering or obstructing the same, until the further order of this court sitting in the county of Suffolk, or of some Justice thereof; and that the defendants have leave to apply at any time to this court sitting in the county of

Suffolk, or to any justice of this court, to dissolve the said injunction.

The Clerk of the Supreme Judicial Court for the county of Suffolk, will enter the foregoing order.

For the Judges,

L. SHAW, C. J. S. J. C."

" Nov. 1, 1843."

An injunction was issued on this order, on the same day.

On the fourth day of December, the answer of the City was filed, denying that the same was ever laid out a public way, or street of said City. A replication thereto was duly filed on the thirteenth day. At the March term of the court, 1845, viz: June 23, 1845, the injunction was made perpetual. It may be proper to remark here, that the court were equally divided upon the question whether the temporary injunction should be dissolved, and the burden was on the City to show sufficient cause for such dissolution; and hence this result. This cause, however, was amicably adjusted between the litigant parties, at the November term of the court, 1846.

The other suit was a bill in equity, brought against the City June 17, 1844, in the same court, by Mrs. Ann Lewis, the wife of Joseph W. Lewis, one of the owners of the ropewalk lands, and one of the grantors thereof to the City, to recover her dower in the three ropewalk lots, granted in 1794, viz: lot 1, 2, and 3, and in land at the corner of Carver and Pleasant streets. The City contended that Mr. Lewis, her husband, by virtue of the resolve of the Legislature, before referred to, released her dower in these lots, and that it was also released subsequently by the joint deed of herself and her husband. In opposition to

which she contended that the Legislature had no right to empower her husband to release the same, and further, that she was of unsound mind at the time her husband's deed, as well as at the time their joint deed was executed.

The cause was referred to a Master in Chancery to ascertain the value of her equitable dower in the premises, who reported as follows, viz:

That the true value of the three ropewalk

lots, February 21, 1824, was	- - -	\$33,500.00
The value of the buildings,	- - - -	14,500.00
The value of the house and land at the corner of Carver and Pleasant streets,	-	9,000.00
<hr/>		
		\$57,000.00
Amount of principal and interest then due upon certain mortgages on the premises,	- - - - -	29,201.78
<hr/>		

Leaving a sum amounting to - - - \$27,798.22  
on which dower was to be computed.

And that on this last mentioned sum the true value of the complainant's (Mrs. Lewis') equitable right of dower in the premises, with annual interest from February 21, 1824, was the sum of five thousand four hundred and five dollars. (\$5,405.00.)

Whereupon on the first day of July, in the year eighteen hundred and forty-five, a final decree was entered by the court in favor of Mrs. Lewis, against the City for the last named sum, and the costs of suit taxed at ninety-five dollars, (\$95.00). And it was further ordered by the court in case said amounts were not paid within two days, that execution therefor should issue against said City.

No execution was ever issued upon this decree;

but on the first day of February, in the year eighteen hundred and forty-nine Mrs. Lewis instituted an action at law, returnable to the March term of the same court then next ensuing, for the recovery of these sums ; the time for the issue of an execution without some additional proceedings having expired ;—and on the twenty-fourth day of May last, judgment was entered in that action in favor of Mrs. Lewis, for the sum of six thousand six hundred and seventy-eight dollars and seventy-three cents debt or damages, and costs amounting to the sum of twenty-nine dollars and sixty-seven cents, both of which sums have been paid by the City upon an execution issued against it ; several sums having been paid by it in the meantime, on account of being adjudged by reason of this decree, a trustee of Mrs. Lewis, in sundry suits instituted against her, by different individuals.

Your Committee have thus, at great length, stated the various proceedings of the town and city in reference to the Public Garden, and have, in giving its early history and title, the latter of which is inseparably connected and interwoven with the title of the City to its other public lands, been compelled to allude to their history also ; having deemed a statement so extended, necessary in arriving at a proper knowledge and understanding of the tenure by which that garden is now held by the City. And although some of the facts stated may apparently seem to have no material bearing upon the subject, yet, upon a close inspection, the utility and necessity of their insertion will be readily perceived.

Your Committee have also stated all adjudications of our courts which have been made, relating to the subject, and before proceeding to the consideration

of the relative expediency of the sale or improvement of this land, would beg leave briefly to state; that the original title to it was unquestionably acquired by the town, in the same manner as its title to its other lands, in the early periods of its settlement; that there is, as your Committee confidently and unqualifiedly believe, no incumbrance upon the title, or restriction upon the right and power of the City to dispose of the land by sale or otherwise, unless the same has originated since the time of the acquisition thereof by the town, of which your Committee have no knowledge, and consequently do not believe;—that the town in 1794 granted a part of the present Public Garden, together with a large tract of land lying southerly of the present continuation of Boylston street to the *ropewalk proprietors*, as already mentioned, upon certain conditions;—that they or their assigns were in the possession and occupancy of, and owned the ropewalk lands at the time of the granting of the City Charter, and the organization of the town into a city, without question of their right of property therein, and had so occupied, possessed and owned the same for nearly twenty-eight years before, and continued so to occupy, possess and own the same for about two years afterwards;—that it is admitted that at one time the Public Garden, or some part of it, might have come under the denomination of flats, and as such been appurtenant to the upland; but the *Common* could not have been presumed in law, to draw after it as incident, the adjacent flats, particularly if those flats were of such a nature, as not to admit of their being used and enjoyed for the purpose to which the *Common* itself was appropriated, as stated in one of Mr. Pickering's opinions; that the City, in the year 1824, by good and sufficient deeds of warranty, re-acquired the ropewalk lands; that

a few years afterwards it entered into an indenture with the Boston and Roxbury Mill Corporation, in which the latter covenanted, that neither they nor their assigns should at any time erect any buildings within their basin, (meaning the receiving basin so called,) between Charles street and the channel, immediately in front and west of that street in any event; and further, that they would not erect any building within their basin in front and west of the City's land on that street, within the distance of one hundred rods from that street, unless the City or its assigns should erect buildings upon their land situate on the same;—which covenants may be briefly construed to mean, that in no event should that Corporation or its assigns erect any buildings on this side of the channel, immediately in front and west of Charles street, and in case the City should erect buildings on its land, in front and west of that street, then the Corporation would have a corresponding right to build on their own land on the other side of the channel, but not within the distance above mentioned; and that whenever the Corporation did build within that distance, then all the land in said basin east of a certain line as before mentioned, should revert to the City, and belong to it in fee simple for ever;—that in the latter part of the year 1838, or the early part of the year 1839, nearly all the land comprising the present Public Garden, and the residue sometime afterwards, were permitted by the City to be used by Horace Gray and his associates, for the purposes of a Public Garden, with a reservation however of the right on the part of the City to terminate his, and his associates interest therein and use thereof, upon giving nine months notice to that effect; and that, so far as your Committee believe, such permission has not yet been revoked;—that sales have been made by the

City to various individuals of nearly all the ropewalk lands, south of the continuation of Boylston street, and west of Pleasant street, under the sanction and advice of Mr. Pickering, the former City Solicitor; that the right of the City to sell the Public Garden stands upon the same basis, and is not varied in the slightest manner;—and that such right has never been questioned before any judicial tribunal; that the suit instituted by the Boston and Providence Railroad Corporation has no bearing on the question of such right. It was a suit brought to prevent the closing up, and sale by the City of an alleged public highway, a right to pass and repass over which, and to use which, the complainant and citizens had acquired;—that the injunction issued was to restrain the City from closing up the same on the ground of such right of passage and use;—that the power of the City to dispose of the lands in the vicinity of this highway was not involved in the cause, and was not a question to be decided, and was not decided therein;—but on the contrary the highest judicial tribunal in this Commonwealth, as your Committee believe and confidently state, has established the validity of the alienation or sale (for it may be termed the latter as well as the former) of the ropewalk lands by the town, to the proprietors in 1794; and if the town had a right *then*, to alienate and sell the same, in consideration that rope-walks should not be erected by the proprietors on Pearl street, and no circumstances have occurred since, to impair or destroy that right, of which your Committee have no knowledge, the City certainly has the same right now, or a stronger right now, to dispose of the same for a pecuniary consideration, after an intervening possession by these proprietors, or their assigns, adverse to the world for nearly thirty years, and the impartation

of all their right and title in these lands to the City. A slight review or examination of the main features of the Lewis suit already referred to, will sufficiently establish the ground taken by your Committee.

The first principle, fact, or element to be proved in that suit to induce or justify the decree made by the court, as your Committee believe, was, the fact that her husband had had an estate in fee to the ropewalk lots, Nos. 1, 2, & 3, during his marriage with her; and he could not have had such an estate, unless the grant or sale by the town, in 1794, to Davis, Richardson & Emmons, the original proprietors of these three lots, and from and through whom he claimed title by sundry conveyances, was valid and binding—and inasmuch as such a decree was entered and could not have been entered without the existence of this first material element, the conclusion is irresistible, when we consider that the claim of Mrs. Lewis was violently opposed by the City, and its defence to the suit ably maintained by its counsel, that her husband had such an estate in these lands; and the town, being the original grantor, had a right to, and did grant such an estate; for, if her husband had not such an estate, she clearly had no right to dower therein. Her right to dower, implied the possession by her husband of an estate in fee during their marriage—and his rightful possession in fee implied the right of the town to grant or sell to his grantor in fee. If the town could not make a valid sale, the grantee of the town could not. If the grantee of the town did not own these lands, how could he give a valid title to them to Lewis? If, then, the town, in the year 1794, could dispose of these lands in this manner, and they were not a part of the Com-

mon at the time of the granting of the City Charter, then your Committee have not the least hesitancy in saying, that the City's right to alienate and dispose of the same at this time is unlimited and absolute, and that they did not at the date of the Charter constitute a part of the Common, is beyond question in the minds of your Committee; for by the word Common used therein, could not have been contemplated what is now popularly known as the Common, together with any land situated in that vicinity, which might at any indefinitely remote period be acquired by the City, or any land then owned by private individuals, but the land *then* owned by the *City* and recognized and familiarly known as the Common, lying between Beacon, Park, Tremont, Boylston, and Charles streets. The twenty-sixth section of the Charter provides, "that the City Council shall have the care and superintendence of the public buildings, and the *care, custody, and management of all the property of the City, with power to lease or sell the same*, except the *Common and Faneuil Hall.*" The *Common* is here stated to be a part of the property of the *City*, not the property of *private individuals*, but unequivocally the property of the *City*; and, as a plain and unavoidable conclusion, if a part of the public garden was not at that time, the property of the *City*, it could not, by any mode of reasoning or semblance of reason, have been considered as a part of the Common, and embraced within the scope of this prohibition. What reason would there have been, for the Legislature at that time to have enjoined upon the City, the non-alienation of the property of private individuals, in and to which it then had no claim or title, had had none for nearly twenty-eight years before, and contemplated having none—to say nothing of the recog-

nition at that time by the City, of the bounds of the Common being the five streets last referred to.

This brings your Committee to the consideration of the main subject in your resolution, the expediency of a sale or improvement of this garden, and as the main fact to be considered in deciding this subject, is the financial ability of the City to retain this land, they would beg leave to advert to its present pecuniary condition.

Its present debt, exclusive of the water debt, is	- - - - -	\$1,731,938.79
The water debt is	- - - - -	4,463,205.56
Loans authorized for finishing public buildings at Deer Island, and New Jail,	- - - - -	307,000.00
Estimated cost of conveying the water to East Boston, is	- - - - -	500,000.00
		\$7,002,144.35

So that in all probability at the end of the present fiscal year, the City debt including the many incidental expenses which will arise during the residue of the year, notwithstanding the use by the City of all its other available means and resources, will reach the sum of seven millions of dollars. And it may be well to remark here, that the citizens have not yet paid one cent of the interest even, on the water debt, and its burden has not yet been felt by them, in the slightest manner.

It became necessary in the course of the deliberations of your Committee, to enable them to estimate with any degree of accuracy the value and extent of the land composing the Public Garden, to cause it to be surveyed and laid out on a plan of streets and lots, which

plan they herewith submit, believing that it will materially aid the City Council, in forming their opinion as to the future disposition, or mode of disposition of this property.

Your Committee would here remark, that the whole garden contains about one million square feet of land, and that for the purpose of arriving at a fair, or an approximation to a fair valuation of it, they have supposed that three streets may be laid out through it, parallel or nearly parallel to Beacon street, and extending from Charles street to the water, and covering about one third of the whole land; one of these streets to be one hundred and seventy-five feet in width, and the remaining two, one hundred feet each in width, and that on the street fronting the Common, between Beacon and Boylston streets, there may be laid out,

33 building lots, containing 82,400 feet, which if sold at \$3 per foot, would amount to - - - - -	\$247,200.00
On Beacon street, 21 building lots, con- taining 59,110 feet, at \$3 per foot, - : ,	177,330.00
On the first street south of Beacon, from the Common to the water, 44 building lots, containing 130,423 feet, at \$2 per foot, - - - - -	260.846.00
On the second street south of Beacon, 48 building lots containing 148,337 feet, at \$3 per foot, - - - - -	445,011.00
On the third street south of Beacon, 53 building lots, containig 137,346 feet, at \$2 per foot - - - - -	274,692.00
On Boylston street, 27 building lots, con- taining 59,296 feet, at \$2 per foot, - -	118,592.00

And on the street fronting the water, between Beacon and Boylston streets, 10 building lots, containing 12,928 feet, at \$2 per foot, - - - - - 25,856.00

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Making in all, 236 lots—629,840 feet, valued at - - - - - \$1,549,527.00

The estimated value of the flats west of the Public Garden, containing about 230,000 feet, at 17 cents per foot, - - - - - 39,100.00

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Showing the total value of the Public Garden and flats to be - - - - - \$1,588,627.00

If this land is retained by the City it will certainly require some improvement. In its present condition it is far from meriting the name it bears,—is seldom resorted to by the public, and wholly unworthy to be considered one of the public grounds of the City. If pointed out to the stranger, it is always done with an apology for its uninviting aspect; and from its proximity to our noble Common, even despoils it of some of its grandeur and loveliness.

Your Committee have therefore caused to be ascertained the probable cost of filling up this land, and making it suitable for what it is now styled a Public Garden, and also the expense of keeping it as such.

The cost of filling up the 34,977 squares which it contains, at \$2.50 per square, would be - - - - - \$87,442.50

The expense of filling the streets and front yards to prepare the land for building purposes, 15,724 squares, at \$2.50 per square would be - - - - - \$39,310.00

The value of the land as before stated	\$1,588,627.00
Less the expense of filling streets	39,310.00
Leaving a balance of	\$1,549,317.00
The annual interest upon which, at 6 per cent. is	\$92,959.02
236 houses which can be built upon this land at \$7,000.00 each, would	
amount to	1,652,000.00
Making the sum of	\$3,201,317.00
the annual tax on which at 6½ mills on a dollar, would be	20,808.56
Annual interest on the cost of filling up the Public Garden, viz. on \$87,442.50	5,246.55
Total,	\$119,014.13

So that the annual expense of keeping the Public Garden is about one hundred and twenty thousand dollars; its retention not being of the slightest advantage, and the garden itself no ornament to the City.

Upon the plan it will be perceived, that the largest street is proposed to be ornamented by a park one hundred feet in width, running the whole length of the street, and the two others by large spaces of ground on each side, for trees and shrubbery, so that instead of marring the general appearance of this part of the City the plan if executed will much improve it, and enhance its beauty, to say nothing of the pecuniary advantage which will undoubtedly be derived by the City from a sale.



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## CITY DOCUMENT.—No. 18.

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Your Committee concede that the argument used by some, that it should be the policy of the City to keep open as much territory within its limits as possible, has much force, and it would have been well if more attention had been bestowed upon it in former days; and they would therefore suggest, that if the opening and laying out of new squares or public grounds, at the public expense, should now be deemed advisable, then that those sections of the City which are densely populated, and where the streets are narrow and the air necessarily confined and impure, should be provided with such grounds; and in the present state of the finances of the City, no way would recommend itself so strongly, as the sale of the present Public Garden, and the use of the proceeds in laying out such grounds, for the benefit of those, less favored than the inhabitants residing in the vicinity of the Common.

In conclusion your Committee would beg leave to state, that the subject of the disposal of this land has been so often, and so long agitated, that it is exceedingly desirable that it should be definitely and finally settled at this time. It has presented almost yearly a prolific field for controversy and discussion, and has thus far, unfortunately, never been destined to meet with any final and determinate action on the part of the City Government, and has rested, and probably will continue to rest in the same suspense and uncertainty, unless definitively settled by a vote of the people as hereafter proposed; and your Committee would further state, that from a careful examination and consideration of all the foregoing facts, and biased solely by their own convictions of right, they unhesitatingly express their opinion in favor of the expediency of a sale of this land. But being well aware of the great import-

ance of the subject, and that no City Government should assume the responsibility of a sale, without consulting and following the popular will, would suggest the passage of the annexed resolve.

JOHN P. BIGELOW, *Chairman.*  
S. S. PERKINS,  
BILLINGS BRIGGS,  
ABEL B. MUNROE,  
NATHANIEL BREWER,  
ALBERT T. MINOT,  
BENJAMIN BEAL.

*Resolved*, That it is expedient for the Board of Mayor and Aldermen to submit to the voters of the City, at the next municipal election, the question whether the land belonging to the City lying west of Charles street, known as the "Public Garden," shall be sold.

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CITY OF BOSTON.

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*In Common Council, July 11, 1850.*

The foregoing Report having been accepted, the resolution appended thereto was passed. And thereupon,

*Ordered*, That ten thousand copies of said Report and resolution be printed and distributed among the citizens.

Sent up for concurrence. Read and concurred.

JOHN P. BIGELOW, *Mayor.*

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